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No. 80-404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioner,

versus

H. H. HENDERSON, DWAINE LEE HENDERSON, AND ELIZABETH RILES STEVISON, ADMINISTRATRIX OF THE ESTATE OF GRADY H. STEVISON, DECEASED,
Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented by this Petition are:

I.

Did the fact that a 1972 GMC truck, the replacement vehicle, covered by contract C205187 for $10,000.00, exclude the right of recovery when there was in existence on the same vehicle a policy of $50,000.00 coverage? This is the real question rather than the question proposed by the Petitioners as number one.

II.

Was any error committed by the United States District Court in allowing multiple amendments in the attempt of the Hendersons and Stevisons to discover the policy covering the vehicles and accident in question?

III.

Was there an activation of a terminated contract or was there in fact an extension of a contract in existence by virtue of its own terms as to replacement vehicles and by virtue of operation of the Mississippi Law applicable to renewal of a policy and by virtue of a credit relationship existing between the parties so that the policy had not expired on November 7, 1971, but was still active on November 21, 1971, when the accident occurred?

IV.

Were the Petitioners entitled to a Judgment as a matter of law or to have the Judgment set aside as re-

turned by the jury in the District Court and affirmed by the Fifth Circuit Court? Was the verdict unsupported by the testimony?

V.

Did the Fifth Circuit Court, in light of the testimony and facts presented to the jury and offer of evidence dictated into the record on the question of punitive damages have the right and authority to set aside the decision of the District Judge and reverse him and rule that such damages are allowable and should have been presented to the jury for their decision in the light of Mississippi cases and decisions?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, AND ORDERS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT

Point One 8

Point Two 9

Point Three 13

Point Four 16

Point Five 17

CONCLUSION 26

CERTIFICATE 29

TABLE OF AUTHORITIES

Cases: Page

Boyd Black v. Fidelity & Guaranty Insurance Underwriters, Inc., 582 Fed.2d 984 22

Fletcher v. Western National Life Insurance Co., (1970), 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 18

Lincoln National Life Insurance Co. v. Crews, (1977), 341 So.2d 1321 19

Marcum v. United States of America, Cause No. 78-2248 23,24

Martin v. Traveler's Indemnity Co., (1971), 450 Fed.2d 542 19

Mitcham v. Traveler's Indemnity Co., (CCA 4th) 127 F.2d 27, 29 12

National Security Fire & Casualty Co. v. Mid-State Homes, Inc., 370 So.2d 1351 15

Progressive Casualty Insurance Co. v. Keyes, (1975), 317 So.2d 396 20

Seals v. St. Regis Paper Co., 236 So.2d 388 18

Standard Life Insurance Co. of Indiana v. Veal, (1977), 345 So.2d 239 18,20

Traveler's Indemnity Co. v. Weathersby, (1979), 368 So.2d 829 22

Weathersby v. United Insurance Company of America, (1968), 265 Cal. App. 2d 921, 71 Cal. Rptr. 764 18

TABLE OF AUTHORITIES (Continued)

Page

Woods v. Miss. Power Co., 245 Miss. 103, 146 So.2d 546 19

Other Authorities:

§83-11-5 of the Mississippi Code of 1972 6,14,15

§83-11-7 of the Mississippi Code of 1972 6,13

§83-11-9 of the Mississippi Code of 1972 14

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents pray that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit where Petitioner seeks to review a decision entered by the United States Court of Appeals for the Fifth Circuit on August 19, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in the Petition for Writ of Certiorari filed by the Petitioner on page A-16. After the usual time, Petition for Rehearing was filed and denied without written opinion, and Respondents were not called upon to reply to the Petition for Rehearing.

JURISDICTION

Jurisdiction is attempted to be invoked under the right of the United States Supreme Court to review Orders and Actions of the District Court and Court of Appeals by Writ of Certiorari under Title 28, U.S.C., Section 1254(1), 2101(c) and (f).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND ORDERS INVOLVED

Respondents know of no Constitutional provisions involved. The Supreme Court under Rule 17, does not accept a review on a Writ of Certiorari except when there are special important reasons therefor. In the case at bar, there is no question of conflict between the Federal District Court or the Courts of Appeal with the decision of any other Federal Court, District or Court of Appeal. No Federal question has been decided nor is there any Federal decision in conflict with the State Court decision. The Federal Court of Appeals did not depart from the accepted, usual course of judicial procedure, nor is there any question of sanctioning such a departure by the Federal District Court. Lastly, there is

no important question of Federal law involved that needs settlement by this Court. The issues involved in this case are questions of fact for determination by a jury and the decisions of law are questions of whether facts in evidence are sufficient to justify their consideration by a jury. The primary issues involve the application of the existing State laws applicable to insurance contracts. There has been no issue raised as to the Constitutionality of the State laws in the lower Court. There is involved the question of the extension of coverage beyond the primary term of the insurance by virtue of operation of the State law requiring notice of intention not to renew a policy and/or notice of cancellation of a policy before the same may be terminated which operates as an automatic extension of the policy unless a notice is properly mailed. The question of whether or not the jury should have heard testimony on punitive damages and been allowed to consider the punitive damages against the insurance company, who hid the existence of an insurance policy, there being State and National precedence by Court decisions in support of the consideration of punitive damages in such cases.

STATEMENT OF THE CASE

H. H. Henderson, prior to November 21, 1971, operated a logging business including a tractor-trailer used for that purpose and had in his employ Dwaine Lee Henderson, his nephew, who was the driver of a GMC tractor-trailer, which on November 21, 1971, was involved in an accident wherein Grady H. Stevison was

killed. The circumstances were such that there was little doubt of liability. Prior to trial statements were taken of H. H. Henderson and Dwaine Lee Henderson showing clearly their liability and the probability of a directed verdict.

Mrs. Stevison was appointed Administratrix of the estate of the Deceased and filed suit against H. H. Henderson and Dwaine Lee Henderson and prior to trial was informed by the Hendersons that they had $50,000.00 coverage with United States Fidelity and Guaranty. Mrs. Stevison offered to settle her claim with the Hendersons for $40,000.00. Horton Hillman, attorney for the Hendersons wrote a letter to USF&G demanding that they settle within the policy. It was thereupon disclosed by USF&G that they had a policy existing for $10,000.00 liability covering the GMC tractor-trailer but they denied that there was any other policy.

The Hendersons sued USF&G in Wayne County Chancery Court and sought discovery of the $50,000.00 liability policy asserting that there was such a policy but the case was never tried on its merits. Interrogatories were propounded and answers given which failed to disclose the existence of any $50,000.00 liability policy which would have applied to the accident involved immmediately prior to the date of the accident, USF&G, Petitioners herein, denying the existence of the same in their Answers to Interrogatories. It appeared from the testimony of Mr. Henderson that he first purchased insurance with USF&G's agent,

Sigler Insurance Agency in Waynesboro, Mississippi, for coverage of a 1969 tractor-trailer with a $50,000.00 limit. In 1970, he purchased a 1971 Chevrolet tractor as a replacement for the 1969 tractor and continued to pull the same trailer as described in the original policy.

On the 10th day of November, 1971, the Hendersons bought a GMC tractor as a replacement for the 1971 Chevrolet tractor mentioned in his policy and junked the 1971 tractor. He continued to pull the same trailer described in the policy with a new GMC tractor. On November 21, just nine days later, the accident occurred involving the new GMC truck with the old trailer.

Testimony showed that Mr. Henderson the following morning contacted Sigler Insurance Agency and told them the vehicle he was using was involved in the accident, that it was a replacement for the 1971 Chevrolet and Mr. Sigler responded, "My secretary is not in, but I know you're covered." Four days later, Mr. Henderson received a notice in the mail of intention of nonrenewal of policy No. C3111037. Mr. Henderson had been told by Sigler Insurance Agency that he had the $50,000.00 coverage and had been paying the premiums thereon but he did not have a copy of the policy. When he received this notice, he did not know it applied to one of his policies. This he did not find out until the deposition of Sigler was taken and the Amendment to Complaint allowed. He received no communication prior to the accident from Sigler Insurance Agency or USF&G. The policy renewal date

was November 7, 1971, and on the first renewal of that policy, occurring on November 7, 1969, and again in 1970, premiums were paid up to thirty days after the renewal date and Mr. Henderson testified that he had a credit relationship with Sigler Insurance Agency. He always received his bill after November 7 and that after he received the bill, he paid it.

The policy in question had a clause that extends coverage for thirty days on any replacement vehicle. Sigler and USF&G admitted that Sigler had authority to bind USF&G by his word and that he extended credit to about five per cent of his customers and admitted that he received payment from H. H. Henderson as long after the renewal date as thirty days.

It is the contention of USF&G that the policy expired on November 7, and that the replacement clause, therefore, was non-existent. Mississippi law applicable at the time required automatic renewal of the policy, such as the policy involved in the suit, unless the company mailed a notice thirty days prior to the renewal date of its intention not to renew, this being §83-11-7 of the Mississippi Code of 1972, and also §83-11-5 requiring ten days notice of cancellation for non-payment of premiums of which neither was sent. A subsequent section of the Mississippi Code provided that proof of mailing of notice of intention not to renew to the named insured by certificate of mailing at the address shown on the policy shall be sufficient proof of notice. Neither Mr. Sigler nor any witness for USF&G produced any certificate of mailing of notice and no one

testified that they mailed such a notice. Mr. Sigler admitted that he did not have a certificate of mailing of notice but that the company does customarily send thirty days notice of non-renewal. Mr. Henderson testified that after notifying Sigler of the accident four days later a notice of intention of non-renewal was received.

In the discovery proceedings in Wayne County, USF&G denied coverage and even refused to produce the policy when Interrogatories and discovery were aimed at full disclosure of USF&G and Sigler Insurance Agency of any policy existing prior to the accident that covered the vehicles of the Plaintiff, H. H. Henderson. The case was tried in the Circuit Court of Greene County, and resulted in a directed verdict and a verdict of $100,000.00 which was affirmed by the Supreme Court of the State of Mississippi. Thereafter, in order to effectuate a collection, H. H. Henderson, Dwaine Lee Henderson and the Estate of Grady H. Stevison, Deceased, filed suit against USF&G in the District Court of the Southern District in Hattiesburg, Mississippi. Questions of fact were presented to the jury regarding the notice of non-renewal or cancellation as to whether the same was timely mailed or given in compliance with the Mississippi Statute, the question of whether there was a credit relationship for the automatic extension of the policy, the question of whether there was a replacement vehicle in that the 1971 truck was incapable of further service and junked and whether the 1972 GMC was in fact a replacement

vehicle as provided in the contract of insurance. In effect, the issue was whether the contract was still in effect at the time of the accident by virtue of its own terms and operation of the Mississippi law applicable to notice and/or the credit arrangement in existence for the payment of the premiums and the 1972 GMC being a replacement vehicle under the terms of the policy. The second issue presented to the District Court was the question of punitive damages arising out of the tort committed by USF&G in hiding the existence of the policy rather than defending upon any terms contained in the policy and subjecting the Hendersons to damages in excess of the policy limits and other damages. For further background, see A-20 of the Brief of the Petitioners.

ARGUMENT

Point One

Petitioners argue that the 1972 GMC truck involved in the accident and death of Grady H. Stevison was only covered by an insurance contract for $10,000.00, and that after a Judgment of $100,000.00 was rendered against the Hendersons and affirmed by the Mississippi Supreme Court USF&G paid the $10,000.00 on the Judgment, and therefore, this was the only right that the Hendersons had against USF&G. Respondents would point out that this argument ignored the question of whether or not the Hendersons could have more than one policy and the argument of the Petitioners under Point One would have no bearing if in fact the Respondents had two policies on the same ve-

hicle, and there was nothing contrary in law to prevent the same, if USF&G further had in addition to policy number C205187 for $10,000.00, policy number C3111037 for $50,000.00. Petitioners argue further that when they paid the $10,000.00 policy plus interest and penalties into the Circuit Court of Greene County after the same had been affirmed by the Supreme Court of the State of Mississippi they should be entitled to credit of this against the $50,000.00 award in the Fifth Circuit. This is an obvious erroneous application of the funds since the $15,328.80 was paid on a $100,000.00 Judgment of Greene County and ignores the question of USF&G's liability on a $50,000.00 policy that was later discovered after exhaustive discovery effort and the subject of the lawsuit herein involved. It is apparent from the reading of the argument of the Petitioners on Point One that they assumed as part of the argument the non-existence of the policy number C3111037.

Point Two

There was no error committed by the District Court in permitting multiple Amendments of Complaint through its Order of August 15, 1977, and permitting policy number C3111037 to be identified in the action. It would appear from an examination of the exhausted efforts of H. H. Henderson to discover his $50,000.00 policy in the Wayne County Chancery Court as well as Interrogatories propounded and Requests for Admissions submitted in the Federal District Court of USF&G seeking the identification of any and all poli-

cies that covered the Hendersons immediately prior to November 7, 1971, whereby in answer thereto USF&G denied the existence of the $50,000.00 policy and which policy was not discovered until the subsequent taking of the deposition of James Sigler, Trustee. There was no abuse of discretion on the part of the Honorable Judge Cox in allowing the Amendments once the particular policy that the Hendersons knew they had was discovered. To the contrary, it would be an injustice not to have allowed the amendment in view of the wrongful acts committed by USF&G and its agents in hiding the policy throughout all this period of time. The best response to this was made by the Fifth Circuit Court in its Opinion (A-24), Brief of Petitioner. The Fifth Circuit states the rule to be that: "Amendments will be freely granted when Justice so requires." (A-25), Brief of Petitioners. Petitioners further argue in support of the injustice of allowing the Amendment that policy number C3111037 covered a 1971 Chevrolet truck that was not involved in the accident and the truck involved in the accident was purchased on November 10, 1971, after the expiration date of policy number C3111037. Further, the new GMC truck purchased November 10, was insured by USF&G on another policy being policy number C205187 for $10,000.00, and USF&G paid this amount plus interest and penalties on the $100,000.00 verdict rendered in Greene County and should therefore relieve them for any coverage covering the GMC truck purchased November 10.

This argument ignores first the Mississippi law regarding renewal or non-renewal of policies requiring a notice of intention not to renew and/or notice of cancellation and effecting automatic renewal of policies unless such notices are mailed thirty days prior to the expiration date of the policy as to non-renewal and ten days prior to any cancellation for non-payment of premiums. This argument further ignores the very terms of the policy which allow for the purchase of a replacement truck and provide under the terms of the policy coverage of the replacement truck for thirty days after the truck is purchased within which time the insured has to notify the company of the replacement. The time period here is interesting. The policy came up for renewal on November 7, the replacement truck was purchased November 10, the accident occurred November 21, the agent for USF&G was notified November 22, and said, "You are covered," and four days later a notice of non-renewal was received by H. H. Henderson to policy number C3111037, a copy of which policy, or any of the policies, Mr. Henderson did not have.

The answer to the argument is simple, no law prohibits an insured from owning more than one policy covering the same vehicle. There is an automatic extension of policies by virtue of operation of Mississippi law unless notice of intention of non-renewal is mailed by the company to the insured thirty days prior to the expiration of the policy. The policy, if no notice was mailed on October 7, was in effect on November 10, and on November 21, when the accident occurred, and

its clauses provided coverage for the replacement truck, the GMC. There was, therefore, no automatic transfer of insurance from one car to the other, as argued in *Mitcham v. Traveler's Indemnity Company*, (CCA 4th) 127 F.2d 27, 29, but instead a continuation of the same policy covering the same trailer as originally described in the policy through several renewals and a replacement truck. Mr. Roberts in his brief on the point further argues that the first notice of the replacement truck under policy number C3111037 was August 15, 1977. This argument is not supported by the testimony in the lower Court which showed that Mr. Henderson notified Mr. Sigler, the agent for USF&G of the replacement truck the day after the accident, a period within the thirty days grace for so doing, all of which contain questions of fact rightly presented to the jury in the District Court trial. Petitioners further argue that the lower Court collected from the $50,000.00 the premium that had not been paid. It is interesting to note that a later decision rendered after the trial of that case specifically noted that no premium was necessary to be paid under the circumstances.

Respondents herein believe that the Honorable Judge Cox was wrong in deducting the premium, but no issue was made for the consideration of this to the Fifth Circuit at the time Cross-Appeal was made. It has always been a principle of law that you are not required to do a useless thing and to pay a premium on a policy that is being denied by USF&G even before the Hendersons went to trial in Greene County would

have been a useless thing. Because, if USF&G had accepted the premium, they would have admitted the existence of the policy which they were hiding at the time.

Point Three

The District Court did not activate or assist in activating a contract of insurance on August 15, 1977, and the policy did not expire on November 7, 1971. Petitioners are attempting to argue that the terms of policy number C3111037 provided for its termination on November 7, 1971, and therefore, the policy was not in existence on November 10, when the insured purchased the 1972 GMC truck to pull a trailer that was described in the policy, nor was the policy in existence on November 21, 1971, when the accident occurred involving the GMC truck and trailer owned by the Hendersons and operated by one of the Hendersons. The argument therefore assumes that when the District Court allowed the Hendersons and Stevisons to amend their pleadings on August 15, 1977, to sue on policy number C3111037 this was in effect an activation of a policy that had expired. That argument has to assume certain things that are not true, first the argument has to ignore §83-11-7 of the Mississippi Code of 1972, which statute became effective on April 2, 1970, providing as follows:

> "No insurer shall fail to renew a policy unless it shall mail or deliver to the named insured at the address shown in the policy at least thirty days advance notice of its intention not to renew."

§83-11-5 provides twenty days prior notice to the effective date of cancellation of a policy unless cancellation is for non-payment of premiums and then at least ten days notice of cancellation is necessary. §83-11-9 of the Mississippi Code of 1972 Annotated provides:

> "Proof of mailing of notice of cancellation or of intention not to renew or of reasons of cancellation to the named insured by certificate of mailing at the address shown in the policy shall be sufficient proof of notice."

These sections of the Mississippi Code therefore have amended any provisions of the policies that are in existence within the State of Mississippi so that they conform to the above law which was the law in effect, therefore, on the November renewal of the policy involved in this suit, which policy was renewed in November of 1970, and came up for renewal in November of 1971. Petitioner's argument must ignore the provisions within the policy for coverage of any replacement vehicle for a period of thirty days after purchase of the replacement vehicle. It is therefore obvious that the Petitioner, USF&G, was by law required to renew the policy covering the 1971 Chevrolet truck and the old trailer described therein unless USF&G or Sigler could show proof of mailing notice of intention of non-renewal thirty days prior to November 7, 1971, or the policy would automatically be renewed. Even if the above sections had not been passed, there was evidence in the record to show that a credit relationship

had been established between Sigler Insurance Agency, agent for USF&G, and H. H. Henderson, Respondent herein, for the renewal of the policy. Assuming the contrary to be the truth, §83-11-5 would require ten days notice of cancellation for non-payment of premiums and no evidence of this was offered whatsoever during the trial. The record of the lower Court disclosed that it was uncontradicted that Mr. Henderson did in fact purchase the GMC truck as a replacement vehicle on November 10, which was the vehicle involved in the accident on November 21, and the following day, Mr. Sigler, according to Mr. Henderson's testimony, was notified of the wreck and of the replacement vehicle and according to the testimony, Mr. Sigler responded, "You are covered,". It would therefore appear, that the Hendersons have met all of the requirements for coverage of the GMC truck under policy number C3111037.

It would appear that the only way that USF&G could argue that the policy was terminated would be to prove that they had mailed a notice of intention not to renew and that such notice was mailed in fact on October 7, 1971, *National Security Fire & Casualty Co. v. Mid-State Homes, Inc.*, 370 So.2d 1351. The job of convincing a jury that this was true was the Petitioner's when they had no certificate of mailing, and offered no testimony of a date of mailing or even of anyone mailing such a notice, and the uncontradicted evidence showed that the notice was received four days after the accident or around November 25, of 1971. Respondents particularly like

the answer that the Fifth Circuit Court has given to argument of the Petitioners, (A-26):

> "The primary flaw in USF&G's position is that it relies upon resolution in USF&G's favor of all factual issues that are within the jury's province."

We believe that the Fifth Circuit's opinion and recitation of facts contained in its response to this argument, is perhaps more clear and cogent than ours, we therefore refer to the opinion of the Fifth Circuit (A-26 to A-29), Brief of Petitioner.

Point Four

Petitioners were never entitled to a Judgment as a matter of law nor were they entitled to have the Judgment rendered by the jury in the District Court set aside. Petitioners again argue the same argument that Respondent has been answering throughout the early part of this Brief, but again, the argument is based on the admission of certain testified facts which, if believed by the jury, would end in a different result and specifically in connection with the question of a $10,000.00 policy issued on the 1972 GMC which Respondents called a replacement vehicle. Petitioners ignore the testimony offered in Court which was not rebutted that there were two liability policies on the same GMC truck because of an error of USF&G's agent.

Mr. Henderson believed that the only insurance he had was a $50,000.00 policy and he did not discover the existence of the $10,000.00 policy until after suit was

had and USF&G first asserted that this was the only coverage he had. In view of the time limit and in view of the fact that the $10,000.00 policy was issued by mistake out of the Hattiesburg office, it would be impossible for Mr. Sigler to have known about the $10,000.00 policy on November 22, the day after the accident, when he told Mr. Henderson that he was covered. Sigler Insurance Agency is in Waynesboro, Mississippi, some sixty to ninety miles away. Mr. Henderson specifically testified that when he bought the GMC truck to replace the 1971 Chevrolet, this being the second replacement truck purchased under the policy, that he did not order any liability insurance on that truck at that time and had no knowledge of any liability being issued other than the policy with Sigler Insurance Agency. He ordered collision insurance from Ross-King-Walker through the Richton Bank but he wasn't looking for a new liability insurance policy when he bought the GMC truck because he was going to take it and replace the one he had used to pull the trailer. He knew he had liability with Sigler and there wasn't any need to buy an additional liability policy at a different place with the same company. His testimony to this effect was undenied.

Point Five

It will be noted that in responding to the Petitioner's Brief Respondent has made no reply to the cases cited. Respondents feel that the cases only support propositions not in issue and do not relate in any way to the

real issues presented in the Fifth Circuit Court or in the District Court.

The Fifth Circuit was correct in overruling the decision of the District Judge in the face of the evidence presented for refusing to allow the question of punitive damages to be considered by the jury. Mississippi has heretofore considered the question of tort liability of an insurance company over and above the contractual liability under the terms of its policy for refusing to settle a claim within the coverage afforded by the policy. This question came up in many states where the insurer has been held liable, *Weathersby v. United Insurance Company of America,* 265 Cal. App. 2d 921, 71 Cal. Rptr. 764 (1968), *Fletcher v. Western National Life Insurance Company,* 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970). In November of 1977, the Mississippi Supreme Court awarded punitive damages in the case of *Standard Life Insurance Company of Indiana v. Veal,* 354 So.2d 239, 1977. Prior to this decision without exception, the Mississippi Supreme Court has set forth the elements necessary for imposing exemplary damages as in *Seals v. St. Regis Paper Co.,* 236 So.2d 388, 392:

> "Punitive damages may be recovered for a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong. . . In order to warrant the recovery of punitive damages, there must enter into the injury some element of aggression or some coloring of insult, malice or gross negligence . . . and it has

been frequently held by this Court that punitive damages may be recovered only in cases where the acts complained of are characterized by malice, fraud, oppression, willful wrong or gross negligence evidencing a disregard of the rights of others." *Woods v. Mississippi Power,* 245 Miss. 103, 146 So.2d 546.

In *Lincoln National Life Insurance Company v. Crews,* 341 So.2d 1321 (1977) the Mississippi Supreme Court first considered the question of punitive damages involving an insurance contract in this case, an award of punitive damages was granted in the lower Court. In reversing the award, the Supreme Court noted that Lincoln National defended its suit by relying upon the provisions of its policy and that it acted in good faith. The United States Court of Appeals, Fifth Circuit, considered the case of *Martin v. Travelers Indemnity Company,* 450 Fed.2d 542 (1971) where on page 551 under subtitle 10 the Court said:

"Many courts have defined the degree of consideration owed by the insurer to the insured's interest as one of 'Good Faith. . .' Mississippi, however, still adheres to a far less stringent requirement, one laid down many years ago: Any insurer cannot be found liable in excess of its policy limits for failing to settle an action unless its refusal to settle was so arbitrary and unreasonable as to constitute fraud. . . Ordinarily, application of the standard presents a question of fact, and the

finder of fact must decide whether the insurer properly considered the interest of the insured in refusing an offer of settlement. For example, when a policy limit is $10,000.00 and the Claimant having sued for $100,000.00 offered to settle for $10,000.00, the insured would benefit handsomely by such a settlement. It would preclude a possible judgment against the insured in excess of the policy limits. At the same time, the insurer would wish to reject the offer, since its defense might be successful at trial; and even if it failed at trial, the insurer would risk only the added cost of a litigated defense . . . if on these facts the insurance company refused settlement, the trier of facts would decide whether the possible gain to the insurance company was so unlikely and so insignificant relative to the magnitude and likelihood of detriment to the insured that the insurer was acting arbitrarily and unreasonably with regard to the insured's interest." *Progressive Casualty Insurance Company v. Keyes,* 317 So.2d 396 (1975).

The Mississippi Supreme Court upheld a punitive damages verdict over and above the contract in the case of *Standard Life Insurance Company of Indiana v. Veal,* 354 So.2d 239, (1977). In this case, the Ades Finance Company loaned Mr. Veal $1,008.00 and issued a certificate of insurance evidencing that Mr. Veal and his wife were covered under group Credit Life Insurance Policy by Standard Life Insurance Company of Indiana. The

entire premium was deducted from the loan proceeds. The policy provided that:

> "The insured obligor included the man or the principal obligor and his or her spouse by marriage,"

and the policy further provided that the coverage was joint and that each, "Obligor" would be insured concurrently with the effective date of the indebtedness. Mr. Veal's wife died shortly after the effective date of the insurance certificate, claim was filed to pay the indebtedness and the company wrote Ades that the claim would not be honored basing its denial of the claim on the fact that Mr. Veal's wife's name did not appear on the debt instrument so that there was no debtor-creditor relationship. The case was tried and the jury awarded the Plaintiff $1,008.00 actual damages and $25,000.00 punitive damages. The Supreme Court held that the punitive damages were proper when the reason for denying the payment was contrary to the expressed terms of the policy. The Supreme Court noted that in the instant case there was no requirement in the insurance policy that the spouse of the insured obligor sign the note so that the reason assigned by the Defendant for failing to pay the claim for the death of Plaintiff's wife were without foundation whatsoever. The Court went on to say as follows:

> "Defendant failed to honor the legitimate claim filed following the death of Plaintiff's wife and there was no reason whatsoever to justify its action. It only offered to pay the face amount of the

> policy after the Plaintiff had filed its suit. This case demonstrates the necessity of awarding punitive damages when an insurance company refuses to pay a legitimate claim and bases its refusal to honor the claim on a reason clearly contrary to the expressed provision of its own policy. If an insurance company cannot be subjected to punitive damages, it could intentionally and unreasonably refuse payment of a legitimate claim with veritable immunity. To permit an insurer to deny a legitimate claim, and force Claimant to litigate with no fear that Claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely."

It is obvious that the Mississippi Supreme Court feels that to deny claims under circumstances in which the company knew its denial was wrong or the company had been so grossly negligent that its denial had the same effect, is equivalent to fraud subjecting the company to liability for punitive damages. See also *Boyd Black v. Fidelity & Guaranty Insurance Underwriters, Inc.*, 582 Fed.2d 984 and *Traveler's Indemnity Co. v. Weathersby*, 368 So.2d 829 (1979).

Under the factual situation presented to the jury and to the District Judge, there was evidence, which if believed by the jury, would have justified punitive damages, to wit: the actual existence of a $50,000.00 policy,

the hiding of the $50,000.00 policy, the subjecting of the Hendersons to a directed verdict and judgment in the sum of $100,000.00 when the case could have been settled for $40,000.00, also, the additional damages suffered by Henderson by being put out of business because of the Judgment, the continued hiding of the liability of USF&G from the Hendersons, until it was finally discovered in a deposition and the assertion as a defense that there was no policy instead of disclosing the policy and defending within the terms of the policy. Note the Opinion of the Fifth Circuit on page A-31.

On page 22 of the Brief of the Petitioner, the case of *Marcum v. United States of America* is cited. See also page 4 of Petitioner's Brief. In both places in the Brief, Petitioner argues that the Fifth Circuit Court has rendered conflicting decisions. A careful reading of the *Marcum* case (A-33) reveals that the case was a Federal tort claim and therefore no jury trial was had. It further reveals that the testimony was primarily written affidavits submitted to the Circuit Judge. There were no live witnesses, so, in effect, the Court of Appeals had the same vantage point as the trial Court. This alone would clearly distinguish any decision in the *Marcum* case from the case at bar. In the *Marcum* case, the Defendant was an employee of the State Department of Labor, approached an area where he was aware some type of work was in progress in the intersection which he was approaching, observed a work truck and one pedestrian crew member and proceeded through the intersection at a speed of thirty miles per hour in

violation of the Louisiana Law, struck visible cables suspended approximately eighteen inches above the road, causing the cable to wrap around the pedestrian's leg dragging him to the ground where his head struck a curb and he was killed. The District Judge dismissed the Plaintiff's case finding that Defendant was not negligent and further that Marcum, the Deceased, was contributorily negligent. It is noted that under Louisiana law contributory negligence is not a defense to a pedestrian's claim for damages sustained as a result of negligence of a motorist. The Court held that where the Appellate Court was capable of viewing the same evidence from the same vantage point as the trial Court and was left with a definite firm conviction that a mistake had been committed, that there was clear error and the case should be reversed. The Appellate Court noted that while the Trial Court determined there was no evidence on the part of the government employee, this was clearly contrary to the Louisiana law since the Defendant breached a legal duty imposed on the Defendant to protect Plaintiff against the particular risks and harm involved. That the accident could not have happened but for the Defendant's proceeding through the intersection at an estimated speed of thirty-five miles per hour, failing to see the cable and dragging Marcum to his eventual death. The *Marcum* case is clearly distinguishable from the case at bar in that the Fifth Circuit Court in this case has not attempted to decide the facts but has noted that where a jury verdict is supported by facts, which if believed would justify the verdict, the verdict should be sup-

ported. Likewise, where there is evidence if believed by the jury which would support a punitive damage instruction and one was denied, then this case should be reversed and the issue properly presented to the jury. In making these decisions, the Fifth Circuit did not attempt to make a decision on which facts were true, nor attempt to supplant its opinion of the truth over and above the jury verdict in the District Court. They did note that the District Judge failed to take note of evidence which if believed by the jury would sustain a punitive damage verdict and was in error in refusing to allow the jury to consider the question of punitive damages. Looking at the proposition from another point of view, and examining all of the evidence in the record offered by the Plaintiff, who is the Respondent herein, both the District Court Judge and the Appellate Judges could view such evidence from the same vantage point to determine whether or not there was sufficient evidence offered by the Plaintiff in the District Court which, if true, or believed by the jury, would justify punitive damages. So, in this sense, the Petitioners are wrong when they say the same vantage point does not exist because the District Judge, Judge Cox, heard every witness testify. The inflections of the witnesses, their demeanor, are really issues for a jury to determine and not the issues for the Judge to determine so that the Fifth Circuit Judges are fully capable of standing in the shoes of the District Judge in making a legal ruling based upon the available evidence at the point when the case is submitted to the jury. The argument of the Petitioner is therefore without merit.

CONCLUSION

The 1972 GMC truck was covered by policy number C3111037 up to November 7, 1971, and extended up through November 21, 1971, the date of the accident, by reason of operation of Mississippi law if proper notices for non-renewal were not mailed and which was a question of fact for the jury and which they resolved in favor of your Defendants herein. It is immaterial that there also existed an insurance contract number C205187 issued by a separate insurance agency by mistake covering the same vehicle as to liability. The 1972 GMC truck was a replacement truck within the terms of the policy as is well supported by the evidence and the jury so found. No notice was given as required by the Mississippi law, this was supported by the evidence and the jury so found. There was no substitution of vehicles from one policy to the other according to the evidence and the jury so found. The attempt to bind the Respondents to the original pleadings as to one policy or another in the face of the undenied testimony that the Respondent had no policy; that all of the original policies were in the possession of the Petitioner. That Respondents continued to seek the $50,000.00 policy throughout all of the litigation until the same was discovered and the last amendment was allowed to sue on the newly discovered policy. This is consistent with the testimony of USF&G's own agent, who admitted he knew that there was a $50,000.00 policy and that Henderson was looking for the same. Henderson claimed he had a $50,000.00 policy cover-

ing the vehicle. Sigler had no way of knowing there was a $10,000.00 policy. The next day when Henderson walked into Sigler's office after the accident and told him of the accident, Sigler responded, "You're covered" particularly when the relationship between the two is viewed in the light of their past business relations where the same policy had been renewed several times before, based on a credit relationship. A newly acquired $10,000.00 policy, having been acquired by mistake and unknown to Mr. Henderson only eleven days before the accident from an agent in another town sixty or eighty miles away, could not be the one that Henderson and Sigler were talking about the day after the accident. In view of all of the attempts of USF&G to hide its legal duty, arising out of its contractual and business relationship with Henderson, there is little doubt if this evidence is true and accepted by a jury that the Plaintiff would be entitled to punitive damages in addition to the face amount of the policy. We believe and do contend that the Fifth Circuit Court rulings are correct, that the verdict of the jury for the $50,000.00 face amount of the policy was correct, but that the Cross-Appeal filed by the Respondents in the Fifth Circuit Court of Appeals was also correct in its contention that the District Judge erred only in failing to allow the issue of punitive damages to be presented to the jury. Therefore, the reversal of this case for a trial on the tort issue only before a jury is correct and should be upheld. Petitioner therefore concludes that the Petition for Writ of Certiorari should be denied and there is no

merit to the arguments or conclusions of the Petitioner.

Respectfully submitted,

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